Supreme Court, U.S.
FILED

021549 APR 22 2003

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No. _____

In The

Supreme Court of the United States

BRUCE I. YAMASHITA,

Petitioner,

v.

GORDON R. ENGLAND,
in his capacity as the Secretary of the Navy,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals
District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

CLAYTON C. IKEI
Counsel of Record
1440 Kapiolani Boulevard
Suite 1203
Honolulu, Hawaii 96814
(808) 533-3777

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

19 pp

QUESTIONS PRESENTED

1. Whether the District of Columbia Circuit erred in affirming the dismissal of the Petitioner Yamashita's complaint that the decisions of the Board of Corrections of Naval Records and the Naval Discharge Review Board were Arbitrary and Capricious.

2. Whether the District of Columbia Circuit erred in affirming the dismissal of Petitioner's Due Process and Equal Protection Claims.

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OPINION BELOW

The opinion of district court and the opinion of the appellate court (App. *infra*, App. 1) are unreported.

CONCISE STATEMENT OF THE BASIS OF THE JURISDICTION IN THIS COURT

This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1). The Order of the United States Court of Appeals for the District of Columbia Circuit granting the Appellees' Motion for Summary Affirmance was entered on December 23, 2002, No. 02-5176. The Memorandum Opinion and Order of the United States District Court for the District of Columbia was filed on September 2, 1999; the Order of the United States District Court for the District of Columbia denying Petitioner's Motion to Alter or Amend the Court's Memorandum Opinion and Order was filed on March 30, 2002, Civil No. 98-1638 (EGS). Notifications required by Rule 29.4(b) have been made.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

The statutes, regulatory, and court rules pertinent to this appeal are: 32 C.F.R. Part 51 - "The Department of Defense Military Equal Opportunity Program."

STATEMENT OF THE CASE

Petitioner Bruce I. Yamashita ("Yamashita") is an American of Japanese ancestry. He was born in the State of Hawaii, and is a graduate of the University of Hawaii, Georgetown University School of Foreign Service, and Georgetown University Law Center.

In 1988, while Yamashita was a third year law student at Georgetown University, he made the decision to serve his country by enlisting in the United States Marine Corps. In a letter dated January 10, 1989, Yamashita was notified that he had been accepted into the 140th Officer Candidate Class (hereinafter "140th OCC"), United States Marine Corps (hereinafter "USMC").

On February 6, 1989, Yamashita reported to the 140th OCC, Quantico, Virginia. The Commanding Officer for Officer Candidate School (hereinafter "OCS") was Colonel William Reinke. Yamashita was subjected to unlawful racial harassment and discrimination during the 140th OCC which was a violation of applicable Department of Defense regulations, and the Fifth Amendment to the United States Constitution.

The drill instructors at the 140th OCC who engaged in the unlawful discriminatory conduct, were also responsible for the candidate evaluations of Yamashita, which caused the dis-enrollment of Yamashita from the 140th OCC due to "Unsatisfactory Performance-Leadership" on April 12, 1989, two days before the graduation ceremony, and after he had completed the entire nine week course of training. On the same day, three of the four remaining racial minority candidates in Yamashita's platoon were also dis-enrolled.

On January 12, 1990, Yamashita wrote a letter to General Alfred M. Gray (hereinafter "Gray"), Commandant of the USMC, informing Gray of the discriminatory and unfair treatment that Yamashita suffered at the 140th OCC. On February 26, 1990, Gray informed Yamashita that the investigation was complete, and that it had found no evidence of discriminatory and unfair treatment at the 140th OCC.

On October 5, 1990, Yamashita filed Petitions for relief with the Naval Discharge Review Board ("NDRB") and the Board for Correction of Naval Records ("BCNR"), pursuant to Title 32, Code of Federal Regulations. On November 9, 1990, General Carl E. Mundy, Jr., Commandant of the Marine Corps, re-opened the case and ordered a second Inspector General investigation.

On May 29, 1991, the USMC's Inspector General reversed its earlier findings, and substantiated the following incidents of racial harassment and treatment at the 140th OCC, which incidents violated Marine Corps regulations:

a. On the first day of the course at the mess hall, a Staff Sergeant Hatfield bellowed to Yamashita, in the presence of the entire company, "You speak English? We don't want your kind around here, go back to your country!";

b. Master Sergeant Runyun, throughout the nine week course, spoke to Yamashita in broken Japanese and in the presence of other officer candidates, despite the fact the he spoke to every other candidate in English, and that Yamashita's native language was English;

c. Sergeant Carabine and Sergeant Wade for a period of one week, addressed Yamashita as "Kamikaze Man" in the presence of other officer candidates;

d. Sergeant Carrasco, throughout the nine week course, addressed Yamashita during training as "Kawasaki, Yamaha, Yamashita" or such other derivations of well known Japanese consumer products; and

e. Staff Sergeant Brice, after asking Yamashita whether Japan and Russia had ever been officially at war during World War II, and Yamashita answered in the affirmative, screamed at Yamashita during a platoon formation, "No way, because we whipped your Japanese ass!"

On August 30, 1991, Major General H.E. Davison, Deputy Naval Inspector General, based on the results of the second Inspector General Investigation, provided a written apology, and as a remedy allowed Yamashita to return to Quantico and "again compete for a commission at OCS." On October 29, 1991, Yamashita refused the USMC offer because he had successfully completed the entire nine week course, two and a half years earlier in April of 1989. The USMC proposed resolution failed to acknowledge that but for the admitted racial harassment and unfair treatment which tainted the subjective leadership evaluation, Yamashita would have graduated with the 140th OCC, and received training, pay, benefits and promotions.

On August 26, 1992 the NDRB scheduled a document review of Yamashita's case based on the understanding that if Yamashita was not satisfied with the decision that

he would be permitted to make a personal appearance before the Board in Washington D.C. Yamashita submitted testimony from Dr. Stanley Sue, showing that the racial remarks tainted the subjective evaluation process. Dr. Sue's testimony focused on research supporting the conclusion that the racial harassment and unfair treatment experienced by Yamashita at the 140th OCC reflected negative racial stereotyping of Yamashita that improperly affected the subjective evaluation process.

On November 19, 1992, Yamashita appeared before the NDRB and presented the testimony of other disenrolled minority candidates from the 140th OCC. Yamashita further submitted the written report and uncontradicted testimony of a statistician who testified that based on a study conducted by the Marine Corps as to the disenrollment rates of white and minority candidates at OCC between 1982 to 1990, it was clear that race was a factor in the dis-enrollment of minority candidates from OCC during the period of 1982 to 1990. Moreover, in Yamashita's class, the dis-enrollment rate for minority candidates was 114% higher than the dis-enrollment rate for Whites.

Despite the substantiation by the USMC that Yamashita had been subjected to unlawful racial harassment at the 140th OCC, and statistics showing institutional racial discrimination at OCS, the NDRB denied Yamashita's request for relief. The chairperson stated during the hearing that she was not aware of any Navy or Marine Corps administrative board which could provide adequate relief for the harm suffered by Yamashita due to the discriminatory treatment and unlawful separation.

On January 22, 1993, Lieutenant General M.T. Cooper (hereinafter "Cooper"), Head of Manpower and Reserve Affairs, USMC, in another reversal of position, offered Yamashita a commission as a Second Lieutenant in the USMC. In his letter, Cooper grudgingly stated, "We are not prepared to commission you retroactively . . . . However, in order to afford you the benefit of the doubt, even though your successful completion of Officer Candidate School and, thereby, your eligibility for a commission remain in question, we are prepared to request that the Secretary of the Navy authorize us to commission you a second lieutenant."

On February 4, 1993, Cooper ordered revisions to the OCS Standing Operating Procedures (hereinafter "SOP") which would specifically prohibit the sort of discriminatory conduct that occurred to Yamashita during the 140th OCC. In his letter to Yamashita, Cooper stated, "I have personally reviewed the current OCS SOP and determined that additional revisions are necessary. A new revision has been prepared and will be incorporated in the SOP at the earliest possible date."

On March 19, 1993, the BCNR, nearly two and a half years after Yamashita first submitted his petition, denied relief to Yamashita stating, "the matters which you have specified to have removed from Mr. Yamashita's records are not a part of his official military personnel file."

On May 20, 1993, Yamashita informed Cooper that he could not accept the USMC's most recent offer to commission him a Second Lieutenant because it did not provide relief for the harm suffered during the 140th OCC. In his letter to Cooper, Yamashita stated, "it does not honor the eight year contract that I signed in 1989, compensate for

the four years that have passed since I was disenrolled, and recognize that the discriminatory racial remarks and unlawful conduct that occurred during the 140th Officer Candidate Class tainted the subjective leadership evaluation."

On December 6, 1993, Frederick F.Y. Pang (hereinafter "Pang"), Assistant Secretary of the Navy, intervened in the case and offered Yamashita a commission to the rank of Captain in the USMC Reserve. Pang acknowledged the absence of an administrative system with the authority to provide adequate relief for harm caused due to racial discrimination, stating, "Your appointment in the Marine Corps Reserve is the only type of appointment the Secretary has the authority to effect . . . . This action is based upon a thorough review of your allegations of racial discrimination, the extensive investigative record assembled by the Inspector General of the Marine Corps, and the absence of any meaningful alternative remedies presently available."

On March 18, 1994, Yamashita was commissioned a Captain in the USMC Reserve. Yamashita has since remained in the Stand-by Reserves, the lowest echelon of readiness; he has not received training, pay, benefits, or served on active duty.

On June 28, 1994, per an agreement with the Secretary of the Navy, Yamashita re-submitted petitions to the NDRB, and BCNR requesting that these Boards provide him full relief for the unlawful discrimination including, but not limited to, correction of OCC's Records, reinstatement, promotion, back pay, benefits and training.

On September 12, 1994, Yamashita filed a Petition for Declaratory Order with the NDRB pursuant to 5 U.S.C.

§ 554(e). On October 6, 1994, P.I. Grant of the Council of Personnel Boards responded to Yamashita's Petition for Declaratory Order stating that "the NDRB has taken all possible affirmative action within its jurisdiction to address those matters presented by the petitioner, I see no basis, or value, to ordering a new hearing or ordering the issuance of the Declaratory Order reaffirming findings that have previously been made. In view of the foregoing, I intend to take no further action with regard to the petitioner's request for a Declaratory Order."

On January 11, 1995, Yamashita filed a Complaint, Case Number 95-0060-EGS, in the United States District Court for the District of Columbia. On April 17, 1995, Respondent filed Defendants' Motion to Dismiss because: (1) The Court lacked subject matter jurisdiction; (2) Yamashita failed to state a claim for which relief could be granted; and (3) There are no genuine issues of material fact in dispute. On July 24, 1995, United States District Judge Emmet G. Sullivan, ordered that the Complaint be dismissed without prejudice in view of the pendency of the underlying administrative proceedings.

In a letter dated October 3, 1997, Bernard Rostker, Assistant Secretary of the Navy, sent Yamashita a letter stating, " . . . the Board's proposed decision is disapproved and relief is granted in part. Petitioner's request to change his initial commissioning date in the Marine Corps Reserve to 14 April 1989, the commissioning date of other members of his OCS class, is granted. Petitioner will be credited with service in the standby reserve beginning on that date. With respect to petitioner's additional requests for relief, I agree with the proposed disposition of the BCNR. Accordingly, all other relief is denied." A final administrative decision was reached in Yamashita's case.

Yamashita filed a Second Complaint on June 26, 1998. Defendants filed a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment on September 9, 1998. Yamashita filed a Cross-Motion for Partial Summary Judgment.

REASONS FOR ALLOWANCE OF THE WRIT

I. Yamashita Was Subjected To Unlawful Racial Discrimination And Harassment At OCS

Yamashita was subjected to unlawful racial discrimination and harassment during OCS which adversely affected his performance evaluations and caused him to be dis-enrolled two days before graduation. As noted earlier, on May 29, 1991, the USMC's Inspector General reversed its earlier findings, and substantiated the five incidents of racial harassment and treatment at the 140th OCC, which incidents violated DOD regulations.

These substantiated incidents clearly reveal the unlawful racial discrimination and harassment that Yamashita was subjected to during OCS.

II. Respondent's Violation Of Its Own Regulations Violated Yamashita's Due Process Rights

A federal agency is required to follow its own regulations. *Service v. Dulles*, 354 U.S. 363 (1957). The incidents of racial harassment experienced by Yamashita at the hands of Respondent violated Department of Defense regulations and as such, constituted violation of Yamashita's due process rights. In *Service,* the Supreme Court

held that the State Department could not contravene its own regulations in terminating one of its employees. *Id.* at 388. The Secretary of State reserved discretion to act in discharge cases, but under the regulations promulgated by the Department, could do so only following an appeal by the employee of an unfavorable decision by the Loyalty Review Board. *Id.* at 387. Instead, the Secretary acted to dismiss the employee following a favorable review, in violation of the Department's regulations. *Id.* at 366-68. Once these regulations were in place, the employee was entitled to have them followed. "Consequently, it is now well established that the breach by the government of its own rules and regulations, in itself, can constitute a violation of the due process clause." *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266-69 (1954). Once a governmental agency has undertaken to impose a rule or regulation it is obligated to abide by it. The court in *Service* recognized this by stating:

> While it is of course true that under the McCarran Rider, the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them.

Id. at 388.

Respondent in this case was bound by applicable Department of Defense regulations. Department of Defense policy pertaining to its Equal Opportunity Program sought to:

> Ensure the Military Service (to include the Reserve components) maintain military Equal Opportunity and affirmative action programs. Discrimination that adversely affects persons or groups on race, color, religion, gender, age, or national origin, and that is not supported legally, is contrary to good order and discipline, and is counterproductive to combat readiness and mission accomplishment. Discrimination of this nature shall not be condoned or tolerated.

Department of Defense Military Equal Opportunity Program, section 51.4. Respondent's actions clearly violated Department of Defense regulations pertaining to equal opportunity. The actions of Respondent's drill instructors were clearly directed at Yamashita's Japanese ancestry and adversely affected his performance evaluations. Such conduct constituted unlawful discrimination, clearly prohibited by Department of Defense regulations.

III. The Formal Administrative Remedies Afforded Yamashita Were Inadequate In That The Administrative Boards Which Heard Yamashita's Appeals Were Without Jurisdiction To Grant Full Relief From Admitted Violations Of Government Regulations

Respondent acknowledged that no administrative boards exists that could adequately address Yamashita's complaints of racial discrimination and harassment and provide full relief for admitted violations of government regulations. Yamashita's only formal administrative avenues consisted of appeals to the NDRB and the BCNR. On October 5, 1990, Yamashita filed Petitions for relief with the NDRB and the BCNR, pursuant to Title 32, Code of Federal Regulations. On November 19, 1992, Yamashita

appeared before the NDRB, presenting testimony which showed institutional racial discrimination at OCS for the period 1982 to 1990. Despite the substantiation by the USMC that Yamashita had been subjected to unlawful racial discrimination and harassment at the 140th OCC, and statistics showing institutional racial discrimination at OCS, the NDRB denied Yamashita's request for relief. The chairperson stated during the hearing that she was not aware of any Navy or Marine Corps administrative board which could provide adequate relief for the harm suffered by Yamashita due to the discriminatory treatment and unlawful separation. The NDRB conceded that Yamashita was subjected to racial discrimination and harassment and that this was in violation of service regulations. However, the NDRB informed Yamashita that it was "empowered to change only the character and basis of discharges or separations submitted for review." The BCNR's response on March 19, 1993, nearly two and a half years after Yamashita first submitted his petition, denied relief to Yamashita stating only that the matters which Yamashita sought to have removed from his naval record were not a part of his Official Military Personnel File.

On May 28, 1994, per an agreement with the Secretary of the Navy, Yamashita re-submitted petitions to the NDRB and BCNR, requesting that these Boards provide him full relief for the unlawful discrimination including, but not limited to, correction of OCC's Records, reinstatement, promotion, back pay, benefits and training. The NDRB rejected Yamashita's re-submission, restating that the NDRB had no jurisdiction to give Yamashita full relief and that Yamashita's personal appearance hearing was the highest review possible by the Board.

The BCNR also denied Yamashita's application for relief. The BCNR acknowledged that Yamashita was the victim of discrimination at OCS, but found that the relief already granted "a formal apology and commissioning as a captain in the Marine Corps Reserve, to be an adequate correction of the injustice you have suffered."

On October 3, 1997, Bernard Rostker, Assistant Secretary of the Navy, issued a memorandum disapproving the BCNR's decision and granting relief in part. Ultimately, the Navy's only form of relief was allowing Yamashita to be credited with service in the Marine Corps Reserves beginning on April 14, 1989, the commissioning date of other members of Yamashita's OCS class. All other relief requested by Yamashita was denied. Consequently, the relief granted to Yamashita was inadequate in that Yamashita did not receive the full relief he was entitled to: correction of OCC's Records, reinstatement, promotion, back pay, benefits and training. The Marine Corps acknowledged that Yamashita was subjected to racial discrimination and harassment at OCS by the very people who were responsible for evaluating Yamashita. It follows that but for the discrimination suffered at the hands of Respondent, Yamashita would have graduated from OCS and received his commission along with the other members of the 140th OCC.

IV. The Court Has Jurisdiction To Review Yamashita's Claims And Provide An Adequate Remedy

Judicial review is appropriate for claims of constitutional violations suffered by Yamashita, for which no adequate administrative remedies are available. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court recognized a

cause of action for damages arising from a violation of the Fifth Amendment's due process clause. The Plaintiff in *Davis* was a female deputy administrative assistant who was discharged from her position. She claimed that she was discriminated against on account of her sex, in violation of the Fifth Amendment to the Constitution. *Id.* at 232. In finding a cause of action directly under the Fifth Amendment, the court noted that "unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Id.* at 242; *see also Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

Pursuant to the Administrative Procedure Act, judicial review of administrative decisions are not allowed where agency action is committed to agency discretion. However, a plaintiff may seek judicial review where a constitutional deprivation is claimed and no clear evidence exists to show that congress intended to preclude judicial review in that instance. *Webster v. Doe*, 486 U.S. 592, 604 (1988). Discharged military personnel may invoke the jurisdiction of the court to hear constitutional claims related to their discharge, even where the Secretary has discretion in deciding discharge actions. *Woodward v. U.S.*, 871 F.2d 1068, 1071-73 (Fed. Cir. 1989). In *Woodward,* the U.S. Court of Appeals for the Federal Circuit affirmed that the lower court had jurisdiction to hear the constitutional claims of a discharged Naval reservist who was discharged after acknowledging his homosexuality. The court noted

that while the "Secretary's discretion is generally unfettered, employment actions claimed to be based on constitutionally infirm grounds are nevertheless subject to judicial review." *Id.* at 1072. Hence, the court has jurisdiction over the claims of Yamashita that he was subjected to unlawful racial discrimination.

In *Chappell v. Wallace*, 462 U.S. 296 (1983) the Supreme Court, in holding that active duty military did not have a damage claim for racial discrimination, stated:

> Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances such as those presented by respondents. Military personnel, for example, may avail themselves of the procedures and remedies created by Congress in Art. 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938, which provides:
>
> > Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the

> wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.
>
> The Board for Correction of Naval Records, composed of civilians appointed by the Secretary of the Navy, provides another means with which an aggrieved member of the military may correct any military record . . . when [the Secretary of the Navy acting through the Board] considers it necessary to correct an error or remove an injustice. 10 U.S.C. § 1552(a). Respondents' allegations concerning performance evaluations and promotions, for example, could readily have been made within the framework of this intramilitary administrative procedure. Under the Board's procedures, one aggrieved as respondents claim may request a hearing; if the claims are denied without a hearing, the Board is required to provide a statement of its reasons. 32 CFR §§ 723.3(e)(2), (4), (5), 723.4, 723.5 (1982). The Board is empowered to order retroactive back pay and retroactive promotion. 10 U.S.C. § 1552(c). Board decisions are subject to judicial review, and can be set aside if they are arbitrary, capricious, or not based on substantial evidence. See *Grieg v. United States*, 226 Ct. Cl. 258, 640 F.2d 1261 (1981), *cert. denied*, 455 U.S. 907 (1982); *Sanders v. United States*, 219 Ct. Cl. 285, 594 F.2d 804 (1979).

462 U.S. 296 at 302-303.

In the instant case, the record clearly demonstrates that the administrative remedies envisioned by the Supreme Court were not only inadequate but totally absent

to address and remedy the racial discrimination and harassment to which Yamashita was subjected to at the 140th OCC. As stated, *supra*, Secretary Pang acknowledged the absence of an administrative system with the authority to provide adequate relief for harm caused due to racial discrimination. Yamashita submits that the holding of *Chappell v. Wallace*, 462 U.S. 296 (1983) should be re-visited as it was based on the premise that the military provided administrative remedies to fully and adequately provide redress for racial discrimination.

V. The Courts Have Not Shown A Deference To The Military In Cases In Which The Military Has Used Suspect Classifications To Deny Constitutional Rights Of Its Personnel Nor In Instances In Which The Military Has Violated Its Own Regulations

In *Crawford v. Cushman*, 531 F.2d 1114 (2d Cir. 1976), the Court held that a Marine Corps regulation requiring the discharge of a pregnant Marine as soon as the pregnancy is discovered violated the equal protection aspect of the Due Process Clause of the Fifth Amendment to the U.S. Constitution. Noting that the Supreme Court had not held that a classification based on sex required a "strict scrutiny" test, the Court found that the Marine Corps regulations were not rationally based and thus violated the Plaintiff's due process rights under the Fifth Amendment to the U.S. Constitution.

In *Mendes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), the Court reversed a trial court's dismissal of a former Air Force captain complaint that his separation from the Air Force was caused by a factually erroneous and adverse Officer Effectiveness Report (OER). The Court vacated the

lower court's dismissal and remanded the case with directions to review it on its merits applying the standards which the Court articulated in its opinion. The Court directed that judicial review is available where military officials have violated their own regulations and when the constitutionality of military statutes, executive orders and regulations are challenged. The *Mendes* holding applies to the instant case in that Yamashita is asserting that the race discrimination and racial harassment to which he was subjected to, violated Department of Defense and Marine Corps regulations. Further, Yamashita asserts that the limited authority of the BCNR and NDRB violates his due process rights by their admitted inability to redress the violations of his constitutional rights. See also, *Donham v. Resor*, 436 F.2d 751 (2d Cir. 1971).

In the recent holding of *Crane v. Secretary of the Army*, 92 F. Supp. 2d 155 (W.D.N.Y., 2000), the plaintiff was a discharged Army major, challenging his discharge for violating the Army's weight control program; the Court denied the Army's motion to dismiss his complaint and granted the Plaintiff's motion for summary judgment that the Board of Inquiry's ruling to discharge him was not supported by substantial evidence.

The recent holding by the Court of Appeals for the Federal Circuit in *Berkley v. U.S.*, 287 F.3d 1076 (Fed. Cir. 2002), addresses the Court of Appeals arguments for its summary affirmance, namely, that deference was not afforded to Respondent and that the Petitioner's claim of due process violation was not appropriate for adjudication. In *Berkley*, the Federal Circuit held that the Air Force Secretary's Memorandum of Instruction to the "RIF" Board to afford a certain process to minority and women

officers when making its selections for involuntary separation implicated the equal protection clause of the Fifth Amendment to the U.S. Constitution. In holding that it was adhering to the policy of giving deference to the military for matters involving "discipline, morale, composition and the like," such deference "does not prevent or preclude our review of the Instruction in this case in light of constitutional equal protection claims raised." 287 F.3d 1076 at 1091.

Further, the court citing *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656 (1993), stated:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of a barrier, not the ultimate inability to obtain the benefit.

287 F.3d 1076 at 1086.

Yamashita, owing to his present age, and his status in the stand-by reserves, no longer needs to attend the Marine Corps Officer Candidate School. Moreover, the Marine Corps has revised its OCS standard operating procedure to prohibit racial discrimination and harassment. However, this does not lessen the injury in fact sustained by Yamashita when he was subjected to racial discrimination and harassment at the 140th OCC; when he sought administrative relief for the harm, he was

confronted with an inadequate administrative process established by the Respondent. The result of this inadequate administrative process has been to deny Yamashita an active duty career in the United States Marine Corps.

CONCLUSION

Based on the foregoing arguments, Yamashita would submit that the summary disposition of his appeal is clearly not warranted and therefore, the Petition of Writ of Certiorari should be granted.

Respectfully submitted,

CLAYTON C. IKEI
Counsel of Record
1440 Kapiolani Boulevard
Suite 1203
Honolulu, Hawaii 96814
(808) 533-3777
Counsel for Petitioner

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To The Court Of Appeals
District Of Columbia Circuit

APPENDIX

States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-5176 **September Term, 2002**
98cv01638

Filed On: DEC. 23 2002

Bruce I. Yamashita,
Appellant

v.

Gordon R. England, Secretary of
Department of the Navy, et al.,
Appellees

BEFORE: Henderson, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980) (per curiam). The district court properly granted summary judgment on appellant's claim that his disenrollment from Officer Candidate School denied him due process because there is "no property or liberty interest in a military promotion *per se*." *Blevins v. Orr*, 721 F.2d 1419, 1421-22 (D.C. Cir. 1983); *see also Pauls v. Secretary of the Air Force*, 457 F.2d 294, 297 (1st Cir. 1972) (military

officers "have no constitutional right to be promoted or retained in service"). Nor has appellant pointed to any statute or regulation limiting the Navy's discretion to disenroll an OCS trainee. Moreover, because the district court did not accord deference to the appellees' judgment in ruling on appellant's constitutional claims, appellant's argument that no deference should be accorded to the appellees is unavailing.

As to appellant's claim that existing administrative remedies for OCS discrimination complaints are constitutionally inadequate, appellant never demonstrated that he will again be harmed by the alleged inadequacy of administrative remedies for OCS discrimination, as is required to obtain the prospective equitable relief he seeks. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

Finally, the district court properly granted summary judgment on appellant's claim that he was denied the opportunity to attend the Basic School and Naval Justice School. Appellant cites no authority requiring appellees to offer him such training, and has not countered appellees' assertion that because he never applied for active duty service, there was no reason to formally offer him such training. In addition, it is undisputed that before appellant was offered the commission as a Captain, the Marine Corps offered him the opportunity to attend the Basic School and Naval Justice School, and that the Board for Correction of Naval Records recommended extending this offer again in 1995, but that appellant rejected this recommendation shortly after receiving it.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of

any timely petition for rehearing or petition for rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

/s/ KUT
/s/ [Illegible]
/s/ [Illegible]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE I. YAMASHITA, Plaintiff, v. JOHN H. DALTON, In his capacity as the Secretary of the Navy, *et al.*, Defendants.	)	Civil Action No. 98-1638 (EGS)

MEMORANDUM OPINION AND ORDER

(Filed Sep. 2, 1999)

Plaintiff Bruce Yamashita ("Yamashita") was a candidate in the 140th United States Marine Corps ("Marine Corps") Officer Candidate School ("OCS") in 1989. Two days before his anticipated graduation, Yamashita was disenrolled on the grounds of "unsatisfactory performance." Yamashita disputed that his performance was unsatisfactory, and alleging that racial discrimination tainted the evaluation of his candidacy, initiated a seven year administrative process. Yamashita eventually received substantial relief as a result of this process. After apologizing to Yamashita and acknowledging that the "racially insensititive treatment" to which he was subjected may have compromised his ability to succeed at OCS, Yamashita was commissioned as a Captain in the Marine Corps Reserve effective April 14, 1989, the commissioning date of the other members of his OCS class, and he was offered the training he would be required to complete in order to serve as a Marine Corps officer. In addition, in 1993, the Marine Corps revised the OCS

Standard Operating Procedures ("SOP") to prohibit the type of "racially insensitive treatment" to which Yamashita had been subjected. Yamashita alleges that he did not, however, receive all of the relief that he had requested, including correction of his OCS records, training and backpay. Yamashita then filed suit in this Court seeking this and further relief.[1]

In this Court, Yamashita alleges that the Department of the Navy's decision denying his request to correct his OCS records and to give him back pay and training was arbitrary and capricious under the Administrative Procedure Act. Yamashita alleges that the administrative process under which he sought relief from the Navy violated his Fifth Amendment due process and equal protection rights. Yamashita also appears to request a declaratory judgment that the Navy violated the due process and equal protection clauses of the United States Constitution. Yamashita seeks relief including correction of his OCS records, promotion, back pay, attorney's fees, and costs.

Defendants move to dismiss plaintiff's Fifth Amendment claim and for summary judgment on plaintiff's APA claims. Plaintiff moves for partial summary judgment on his claim that he was subjected to unlawful racial discrimination and harassment, that the Marine Corps violated its own regulations prohibiting racial harassment, and that the Marine Corps' administrative process was

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[1] Yamashita originally filed suit in this Court in January, 1995. See *Yamashita v. Dalton*, Civil Action No. 95-0060 (D.D.C.). This complaint was dismissed without prejudice for failure to exhaust administrative remedies.

inadequate. Upon consideration of the motions, oppositions, replies and the administrative record, the Court will deny in part and grant in part defendant's motion; and will deny plaintiff's motion.

I. Background

Yamashita, a graduate of Georgetown Law School, reported to the 140th Marine Corps' Officer Candidate School ("OCS") on February 6, 1989. Upon successful completion of the 10-week program, candidates are commissioned as Second Lieutenants in the Marine Corps Reserve. In order to then serve in the Marine Corps, a commissioned officer must complete the six-month Basic Officer Course at The Basic School (TBS). A commissioned officer who is a lawyer and wishes to serve in the Marine Corps as a lawyer must also attend Naval Justice School.

OCC candidates receive instruction and are evaluated in the following categories: academics (25%), physical fitness (25%), and leadership (50%). Throughout the course, the staff platoon commander, platoon sergeant and sergeant instructor document a candidate's performance. To successfully complete the program, a candidate must maintain a grade of eighty percent in all areas of testing and evaluation. A candidate who receives minimal passing grades is required to appear before a Company Evaluation Board. These boards are convened once mid-course and once during the week before graduation. A candidate can be disenrolled for, *inter alia*, unsatisfactory performance following the recommendation from a Company Evaluation Board, and upon approval of the Commanding Officer.

Two days before his anticipated graduation, the Commanding Officer informed Yamashita that he was

being disenrolled from OCS on the grounds of "unsatisfactory performance." According to the Commanding Officer, this evaluation was based on, *inter alia*, Yamashita's peer evaluations and Law Small Unit Leadership Evaluation score. As Yamashita was being out-processed, the other members of his OCS class graduated on April 14, 1989.

In January 1990, Yamashita wrote to the Commandant of the Marine Corps ("Commandant") alleging that he had been the victim of derogatory racial comments, that these comments tainted the entire OCS process thereby preventing a fair judgment of his leadership abilities by his peers, and requested that remedial action be taken. *See* Admin. R., Vol. II, at 250-253. Yamashita stated that while he was being out-processed, he complained about the remarks to the Battalion Commander' Executive Officer, but was informed that such remarks were not prohibited by the Marine Corps. *See id.* In the letter, Yamashita stated that he later learned that such remarks were strictly prohibited, and was writing to the Commandant to inquire what the OCS policy was. *Id.* In February 1990, after an inquiry had been conducted by the Inspector General, the Commandant replied to Yamashita's letter, stating that although "the Marine Corps neither condones or tolerates racial remarks or incidents such as those reported in your letter," none of the officers or enlisted personnel interviewed regarding the incidents "believe you were discriminated against. Neither do they feel what you view as 'subtle discrimination' affected their judgment of your potential to be a Marine Officer." *Id.*

On October 5, 1990, Yamashita filed petitions for relief with the Naval Discharge Review Board ("NDRB") and the Board for Correction of Naval Records ("BCNR"). In his petition to the NDRB, Yamashita requested that the

"Board correct my military records relative to the reason for my discharge, by deleting any reference to *Unsatisfactory Performance – Leadership*, and as such, eliminate any possible negative effect on my future." Admin. R., Vol. II, at 365. In his petition to the BCNR, Yamashita requested that (1) his "military records be corrected by giving [him] a satisfactory evaluation for his Platoon Commander, Platoon sergeant and First Company Platoon Sergeant Billets because the evaluation was tainted;" (2) his "Peer Evaluations be deleted from the record because that evaluation was tainted;" (3) the "score of 72 that [he] received for the squad phase of SULE II be changed to a passing score of 80, because the evaluation was tainted." Admin. R., Vol. II, at 224.

Because Yamashita's petition to the BCNR contained new information and allegations he had not advanced in his January 12, 1990 letter to the Commandant, the BCNR requested an advisory opinion from the Marine Corps. *See* Admin. R., Vol II, at 335. In November 1990, the Commandant requested that the Inspector General conduct a second investigation into the allegations and that the BCNR action be held in abeyance pending the resolution of the second inspection. *Id.* In December, 1990, the Marine Corps conducted an equal opportunity Program evaluation of OCS. See Admin. R., Vol. II, at 221. Although the inspection did not detect "[a]ny organized racial or other biased form of discrimination," the inspector did recommend, *inter alia*, that the OCS SOP be expanded to explicitly address discrimination. *Id.* In August 1991, the Inspector General wrote to Yamashita that the second investigation had revealed that during Yamashita's tenure at OCS,

> certain instructors, in their application of controlled stress (a bona fide training tool) did at various times inappropriately use this tool. This was done by focusing on your ethnic heritage. Such application of controlled stress is not condoned and for this an apology is extended.

Admin. R., Vol II., at 220. However, the Inspector General maintained that despite these inappropriate actions,

> the investigation uncovered nothing that would warrant your being commissioned. Nevertheless, since you were, in fact, subjected to ethnic insensitivity, the Commandant of the Marine Corps (General C.E. Mundy, Jr.) in the spirit of fairness is offering you an opportunity to again compete for a commission at OCS under a law contract.

Id. Yamashita rejected this offer, maintaining that he had already successfully completed the OCS course.

On March 17, 1992, the BCNR informed Yamashita that his case was being administratively closed because of the pending NDRB case. On September 23, 1992, the NDRB responded to the petition Yamashita had submitted to it in October 1990, and changed Yamashita's discharge certificate reflecting the basis of separation from "Unsatisfactory Entry Level separation" to "Determination of Service Secretary – Secretary of the Navy Plenary Authority." Admin. R., Vol. I, at 30. The characterization of Yamashita's discharge remained "uncharacterized entry level separation." Admin R. Vol. II, at 127.

In February 1992, United States Senator Daniel K. Inouye and United States Congressman Neil Abercrombie wrote to the Secretary of the Navy expressing their support

for Yamashita's pending petitions before the BCNR and NDRB.

> We note that the Marine Corps has apologized to Mr. Yamashita, thus confirming his contentions about the racially biased conduct of the OCS instructional staff. the Marine Corps has also offered to allow him to repeat the OCS course. Mr. Yamashita has declined that offer, because he feels that he has already completed the OCS training (throughout which he received satisfactory or better ratings until his final evaluation) and that racial bias alone accounts for his final unsatisfactory rating and subsequent disenrollment. In short, Mr. Yamashita believes he has already earned a Marine Corps commission and feels that repetition of the OCS course imposes a double standard of performance twice as burdensome as the requirements imposed upon his OCS classmates. We agree with his contentions, and that is why we support Mr. Yamashita's petitions to the Board for Correction of Naval Records and the Navy Discharge Review Board.

Admin. R., Vol. II, at 149.[2]

On January 22, 1993, the Deputy Chief of Staff for Manpower and Reserve Affairs offered Yamashita a commission as a Second Lieutenant in the Marine Corps effective April 1, 1993 with the obligation that Yamashita

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[2] A number of Senators and Congressmen and women, as well as interested groups, contacted the Navy, Department of Defense, and the White House voicing their support for Yamashita's petitions *See* Admin. R., Vol. II, at 25-64, 121, 141, 271-293, 336-340, 342-345.

attend TBS and then Naval Justice School. Admin. R., Vol. II, at 18. Yamashita rejected this offer.

On January 28, 1993, Yamashita requested that the BCNR case be reopened. The BCNR denied this request on March 19, 1993, stating that

> [t]he matters which you have specified to have removed from Mr. Yamashita's naval record are not part of his Official Military Personnel File. Therefore, his case will remain closed, without prejudice to a future request to reopen it on some other basis.

Admin. R., Vol II, at 123.

On December 6, 1993, Assistant Secretary of the Navy (Manpower and Reserve Affairs) Frederick F.Y. Pang wrote the following to Yamashita:

> I have reviewed your allegations of racial discrimination encountered during Officers Candidate School (OCS) in 1989, the investigation into those allegations conducted by the Inspector General of the Marine Corps, and your correspondence with Marine Corps officials. Based upon a complete review of the facts in your case, I have determined that the racially insensitive treatment to which you were subjected by individuals at OCS contributed to an environment which may have compromised your ability to succeed at OCS, and that remedial action is appropriate.

Admin. R., Vol II., at 86. Pursuant to this determination, the Department of the Navy offered Yamashita an appointment in the Marine Corps Reserve as a Captain. *See id.* Yamashita was advised that upon acceptance of this offer, he could apply to the BCNR to correct what he

perceived to be any remaining error or injustice in his records. *See id.* Yamashita was informed that upon acceptance of the appointment, he had two options. *See id.* He could remain in the standby reserve, but he could not be called to active duty unless he received training at The Basic School. *Id.* at 86-87. Yamashita was also informed that he had the option of resigning upon receiving his appointment. *Id.* at 87. The letter further stated:

> This action is based upon a thorough review of your allegations of racial discrimination, the extensive investigation record assembled by the Inspector General of the Marine Corps, and the absence of any meaningful alternative remedies presently available.

Id. Yamashita accepted this offer and was commissioned as a Captain in the Marine Corps Reserve. Admin. R., Vol. II, at 267. In his letter to Pang accepting the commission, Yamashita stated:

> You state that you intervened in the case because of "the absence of any meaningful alternative remedies presently available." My attorneys and I appreciate the significance of your statement. After three and a half years of working through the administrative process, the Naval Discharge Review Board (NDRB) and the BCNR still refuse to address issues of racial discrimination. . . . Your intervention in the case is a clear demonstration that positive change at the BCNR and the NDRB is a priority at the highest levels of the Naval Service.

Admin. R., Vol. II, at 267-268. To date, Yamashita has not attended The Basic School nor the Naval Justice School to receive further training.

As a result of Yamashita's allegations, which led to an apology by the Marine Corps, as well as his tenacity in pursuing administrative remedies, the 1993 edition of OCS SOP were revised to prohibit the type of "controlled stress" to which Yamashita had been subjected:

> 1. Staff personnel are prohibited from ordering candidates under their charge to participate in activities of initiations or hazing . . . Hazing can also take the form of jokes or comments based on a candidates [sic] race, ethnic background, religion, gender, age or national origin. Such actions are unlawful (Federal E.O.C. Law) and preclude a fair chance of evaluation for the candidate.
>
> 2. Listed below are some examples of hazing and harassment which are specifically prohibited . . . .
>
> > k. Be the object of jokes or comments based on a candidates [sic] race, ethnic background, religion, gender, age or national origin; . . .
> >
> > p. Be subject to ethnic jokes directed toward an individual or a group;
> >
> > q. Be degraded by derogatory comments to language directed towards the individual or towards a group of which that individual is a member.

Pursuant to the letter from Pang, in May 1994, Yamashita submitted another petition to the BCNR and

NDRB[3] requesting that (1) his "OCS records[ ] be corrected by giving [him] a satisfactory evaluation for [his] Platoon Commander, Platoon Sergeant and Company First Sergeant Billets;" (2) his "Peer Evaluations be deleted from the record;" (3) his "score of 72 that [he] received for the squad phase of SULE II be changed to a passing score of 80;" (4) "any reference to *Unsatisfactory Performance – Leadership* be deleted from [his] OCS separation documents;" (5) "his date of commissioning be established April 14, 1989, the date of commissioning for [his] 140th OCS contemporaries;" (6) he "be provided all back pay, service credit and training that [his] 140th OCS contemporaries received." Admin. R., Vol. II, 78.

In August 1994, Yamashita, explained to the BCNR that he was seeking the following relief:

> the board should construct a standard written agreement (SWAG) like that executed by my 140th OCC contemporaries in April 1989. This constructive SWAG would be the basis for establishing service credit, pay and allowances, training and promotional opportunities, et cetera. Equally important to any resolution is the clarification of the jurisdiction and authority of the BCNR. The Assistant Secretary of the Navy stated, in a letter dated December 6, 1993, that he was intervening in the case because of "the absence of any meaningful alternative remedies

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[3] The NDRB denied Yamashita's request in June 1994, stating that his request was beyond their cognizance. In September 1994, Yamashita filed a Petition for Declaratory Order with the NDRB. In October 1994, NDRB advised Yamashita that it had taken all action it could within its jurisdiction. See Compl. ¶¶ 31-33.

> presently available." It is apparent that the current administrative system is inadequate, and is denying basic constitutional protection to thousands of young Americans attending Officer Candidate School.

Admin. R., Vol. II., at 84.

The BCNR initially recommended that Yamashita's petition be denied. On January 19, 1995, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) returned the BCNR's recommendation without action. *See* Admin. R., Vol. II, at 75. The Assistant Secretary directed the BCNR to convene a new panel whose members had no connection with the Marine Corps. The Assistant Secretary also directed that prior to making its decision, the panel should be provided the following information:

> a. The terms of the relief already provided Petitioner and the extent to which that relief has been implemented;
>
> b. Making reasonable assumptions and favorable outcomes, the likely path Petitioner's career would have followed had he successfully completed initial training;
>
> c. A comparison between the relief sought in this Petition and that already provided or assumed in subparagraphs a and b;
>
> d. What effect granting the relief Petitioner seeks would have with respect to when Petitioner would be considered for promotion.

Admin. R., Vol. II, at 13.

In response, the Marine Corps prepared an advisory opinion addressing "the likely path Petitioner's career

would have followed had he successfully completed initial training" and "what effect granting the relief would have with respect to when Petitioner would be considered for promotion." Admin. R., Vol. II, at 11. The opinion further stated:

> 3. The likely path that Captain Yamashita's career may have followed had he successfully completed initial training would be as a Prosecution or Defense Attorney or a Legal Assistance Officer at a major command as his first assignment. After 540 days of observed time in his primary Military Occupational Specialty, he would have the opportunity to apply before an Officer Retention Board (ORB). Selection or non-selection before an ORB would be based on the competitiveness of his overall record.
>
> 4. Captain Yamashita currently has no fitness reports nor any other performance appraisals as a commissioned officer in his Official Military Personnel File. Only after Captain Yamashita has observed performance material in his record will any selection board have enough information to determine if he is the "best and most fully qualified."
>
> 5. In our opinion, Captain Yamashita should be offered a contract and afforded the opportunity to return to active duty to complete the Basic Officer Course and Naval Justice School to obtain the equivalent professional military education of his contemporaries. Upon completion of the Naval Justice school, he can be given the opportunity to demonstrate his professional competence as a Marine lawyer. Only Captain Yamashita's documented performance will enable him to be

> competitive for promotion to Major in fiscal year 2000.

Id.

In June 1995, Yamashita rejected the BCNR's recommendation that he be provided with the opportunity to attend The Basic School and Naval Justice School. Yamashita explained that his reason for rejecting this offer is that

> this is not a reasonable and fair resolution for its [sic] fails to account for the six years that have passed since my unlawful disenrollment. It does not place me on par with my 140th OCS contemporaries who were properly commissioned on April 14, 1989. I should be allowed to enter into a Standard Written Agreement (SWAG) dated April 14, 1989, as did my 140th contemporaries, which would serve as the appropriate framework to provide service credit, back pay, allowances, promotions and training.

Admin. R., Vol. II, at 10.

On November 28, 1995, the BCNR again denied Yamashita's petition to correct his records. Admin. R., Vol. II, at 6. The BCNR stated that Yamashita's request to modify his OCS records was not considered:

> Your request to modify your OCS records, a request you made in your original application of 5 October 1990, once again has not been considered, since your OCS records are not part of your Official Military Personnel File. It is noted that OCS records are subject to destruction in accordance with standard document disposal procedures.

Admin R., Vol. II, at 6. The BCNR concluded that it adhered to its prior decision, which stated in part

> After careful and conscientious consideration of the entire record, the Board again found that the evidence submitted was insufficient to establish the existence of probable material error or injustice warranting the particular relief [Yamashita had] requested. The Board recognized that it had jurisdiction to hear complaints of discrimination at OCS, and that it had the authority to recommend redress where warranted. Although they acknowledged that you were a victim of discrimination at OCS, they found that the relief already granted you, a formal apology and commissioning as a captain in the Marine Corps Reserve, to be an adequate correction of the injustice you have suffered. In this connection, the Board noted that your OMPF does not show that you failed to complete OCS. They further observed that on the contrary, the fact that you were given a commission implies that you did complete OCS.

Admin. Rec. Vol. II, 8-9. The BCNR then added

> they would be unwilling to create a fiction that [Yamashita] performed service as a Marine Corps legal officer before [Yamashita] [ ] demonstrated, by [his] successful completion of The Basic School and Naval Justice School, that [Yamashita is] competent to perform such service. In regard to this they observed that to date, [Yamashita had] declined even to attempt completing this professional training.

Admin. R., Vol. II, at 7. On October 3, 1997, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) disapproved the BCNR's decision in part, deciding that

> Petitioner's request to change his initial commissioning date in the Marine Corps Reserve to 14 April 1989, the commissioning date of other members of his OCS class, is granted. Petitioner will be credited with service in the standby reserve beginning on that date.

Admin. R., Vol. II, at 5. The Assistant Secretary agreed with the BCNR's decision as to the other relief requested, and as a result denied the other requested relief. Yamashita's commission was therefore backdated as effective on April 14, 1998. Yamashita has to date rejected offers to attend TBS and Naval Justice School.

II. Analysis

Yamashita advances three claims. First, Yamashita argues that the decisions of the two boards – the BCNR and the NDRB were arbitrary and capricious. Second, Yamashita alleges that the administrative process under which he sought relief violated his Fifth Amendment due process and equal protection rights. Third, Yamashita appears to seek a declaratory judgment by this Court that the defendants violated the Due Process Clause and the Equal Protection Clause of the Constitution.

A. Yamashita's APA Claims

The agency action under review are the decisions of the BCNR and NDRB, and the question facing the Court is whether the decisions by these boards were arbitrary and capricious or otherwise not in conformance with law. *See* 5 U.S.C. § 706(2)(A). Under this limited scope of review, the Court does not consider whether the Marine Corp's decision to disenroll the plaintiff was arbitrary and capricious

or otherwise not in accordance with law or its regulations. Rather, the scope of the Court's review is limited to reviewing the decisions made by the BCNR and the NDRB.

1. Whether the Decision of the Board for the Corrections of Naval Records was Arbitrary and Capricious

"The Board for the Correction of Naval Records, composed of civilians appointed by the Secretary of the Navy, provides [a] means by which an aggrieved member of the military "'may correct any military record . . . when [the Secretary of the Navy acting through the Board] considers it necessary to correct an error or remove an injustice.'" *Chappell v. Wallace*, 462 U.S. 296, 303 (1983) quoting 10 U.S.C. § 1552(a)(1); 32 C.F.R. § 721.3 *et seq.* This statute defines a military record as "a document or other record that pertains to (1) an individual member or former member of the armed forces." 10 U.S.C. § 1552(g). "The Board is empowered to order retroactive back pay and retroactive promotion." *Id.* quoting 10 U.S.C. § 1552(c). "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence." *Id., Frizelle v. Slater*, 111 F.3d 172, 176 (D.C. Cir. 1997). The agency's decision does not need to be "a model of analytic precision to survive a challenge." *Dickson v. Sec'y of Defense*, 68 F. 3d 1396, 1404 (D.C. Cir. 1995).

Yamashita seeks review of the Secretary's decision denying his request to correct his OCS records. Defendants respond that the records Yamashita seeks to amend are not military records within the meaning of the regulations. Rather, according to defendants these records are located in the OCS "Candidate Record Book." Defs.' Opp'n

to Pl.'s Partial Cross-Mot. for Summ. J. and Reply to Pl's Opp'n to Defs.' Mot. to Dismiss, or in the Alternative, for Summ. J., Ex. 3, 2. Defendants state that these records are kept in the Office of Officer Candidate Administration, and that they are destroyed three years after the OCS training takes place. *Id.* Defendants further state that the sole reason Yamashita's records have not yet been destroyed is the instant litigation. *See* Admin. R., Vol. II, at 6, 60. Plaintiff has not responded to these arguments, and has not presented contrary evidence, but maintains that the BCNR's action was arbitrary and capricious.

Each time the BCNR refused to consider Yamashita's petition that the OCS records be corrected, the BCNR stated that it would not consider the petition because Yamashita's OCS records are not a part of his Official Military Personnel file. However, the BCNR never provided the legal basis for its determination that it could not consider Yamashita's petition for correction or modification of his OCS records. The relevant statue [sic] defines military records as "a document or other record that pertains to (1) an individual member or former member of the armed forces" 10 U.S.C. § 1552(g), and would therefore appear to encompass Yamashita's OCS records.

Volume I of the Administrative Record in this case is Yamashita's Official Military Personnel File. See Def.'s Mot. to Dismiss Pl.'s Compl., or in the Alternative, Mot. for Summ. J. at n.2. This volume of the Administrative Record – Yamashita's Official Military Personnel File – contains at least three copies of portions of his OCS record. *See* Admin. R., Vol. I, at 49, 56, 115. It is not clear whether copies of his OCS records only became a part of Yamashita's Official Military Personnel File as a result of the administrative litigation. However, because those records

are included in the copy of Yamashita's Official Military Personnel File on file with this Court as part of the Administrative Record in this case, and because the BCNR failed to provide the legal basis for its refusal to consider Yamashita's petition, the Court cannot say that the BCNR's decision was rational or in accordance with law. Accordingly, the decision of the BCNR to refuse to consider Yamashita's petition to correct his OCS records will be remanded to the BCNR so that the Board may explain the reason for its decision.

Yamashita seeks review of an alleged denial of his request to be provided training. The Administrative Record clearly indicates that Yamashita has been offered the training that would allow him to serve as an officer, but that he has rejected those offers of training. Since Yamashita has been offered this training, there is no denial of a request to be provided training for this Court to review.

Yamashita seeks review of the BCNR's decision to not award him backpay. 10 U.S.C. § 1552(c) provides for backpay where appropriate "as a result of correcting a record under this section." APA review of the BCNR's denial of Yamashita's claim for backpay, however, belongs in the Court of Claims because defendants assert that should Yamashita prevail on this claim, he would be entitled to approximately $300,000 in backpay. *See Kidwell v. Dep't of the Army, Board for Correction of Military Records*, 56 F.3d 279, 283-286 (D.C. Cir. 1995). Since this claim is not properly before this Court, it will be dismissed without prejudice.

Since the statute itself provides for the relief Yamashita seeks – monetary relief in the form of backpay – and

since APA review of this portion of the BCNR's decision must be brought in the Court of Claims, the Court does not need to reach Yamashita's claim that under the APA, he can seek an equitable lien for backpay, nor the defendants argument that the United States has not waived its sovereign immunity to be sued for the monetary relief Yamashita seeks.

Yamashita seeks to have this Court require the Marine Corps to treat him as though he had never been disenrolled, and that he receive all the benefits to which he would now be entitled had he been serving in the Marine Corps since April of 1989. The BCNR rejected this request because:

> they would be unwilling to create a fiction that [Yamashita] performed service as a Marine Corps legal officer before [Yamashita] [ ] demonstrated, by [his] successful completion of The Basic School and Naval Justice School, that [Yamashita is] competent to perform such service. In regard to this they observed that to date, [Yamashita had] declined even to attempt completing this professional training.

Admin. R., Vol. II, at 7.

Since Yamashita has not yet served as a Marine Corps legal officer because he has not yet completed the prerequisite training, the Court cannot say that the BCNR's decision to deny further relief to Yamashita was arbitrary and capricious.

2. Whether the Decisions of the Naval Discharge Review Board were Arbitrary and Capricious

Yamashita argues that the NDRB decision to change his discharge to "Determination of Service Secretary – Secretary of the Navy Plenary Authority" was unreasonable because the NDRB was unable to "order the USMC to reinstate Plaintiff and grant him an officer's commission in the regular USMC." Pl.'s Mem. of Law in Opp'n to Defs." Mot. to Dismiss, or in the Alternative for Summ. J. at 21-22. Defendants argue that plaintiff's claim is moot because he has accepted a commission in the Marine Corps Reserve as a Captain.

The NDRB is empowered to "change a discharge or dismissal, or issue a new discharge, to reflect its findings." 10 U.S.C. § 1553. When the NDRB changed the characterization of Yamashita's discharge, it therefore did just what it is empowered to do. The Deputy Chief of Staff for Manpower and Reserve Affairs offered Yamashita a commission as a Second Lieutenant in the USMC, thereby obliging Yamashita to attend TBS and then Naval Justice School. Admin. R., Vol. II, at 18. Although Yamashita did not accept this offer, he did eventually accept an offer by the Assistant Secretary of the Navy (Manpower and Reserve Affairs) for an appointment in the Marine Corps Reserve as a Captain. Admin. R., Vol II., at 86, 267. Since Yamashita was offered, and eventually accepted, an officer's commission – which is what he claims the NDRB should have done – Yamashita's claim is moot.

B. Fifth Amendment Due Process and Equal Protection Claim

Yamashita advances a due process claim on the grounds that "the NDRB did not have the ability to administratively remedy Plaintiff's claims for relief." Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss, or in the Alternative for Summ. J. at 21-22; *see* Pl.'s Mot. for Partial Summ. J., at 13-16. Yamashita's argument appears to be that since the NDRB could not, under its regulations, order the Marine Corps to reinstate the plaintiff, he was denied due process of law.

Yamashita's due process claim arising out of the NDRB's statutory lack of authority to offer him a commission, is precluded at least because plaintiff had no property interest in not being disenrolled from OCS. *See Blevins v. Orr*, 721 F.2d 1419, 1421-22 (D.C. Cir. 1983). To the extent that Yamashita claims that due process requires that the NDRB should have been empowered to commission him as an officer, this claim for relief is clearly beyond the power of this Court. *See* U. S. Const. art., I § 8.

C. Claim for Declaratory Judgment

Yamashita seeks a declaratory judgment that defendants violated their own regulations and the due process and equal protection clauses of the Constitution. Yamashita requests that the Court

> 1. Declare and adjudge that the institutional racial discrimination practiced by the United States Marine Corps toward the Plaintiff, and those persons similarly situated, particularly racial minority candidates who attended Officer Candidate School between 1982 and 1990, was in

> violation of applicable Department of Defense regulations, Department of the Navy Regulations, United States Marine Corps regulations, Executive Orders, and due process of law and equal protection guaranteed by the Fifth Amendment to the Constitution.

Compl. ¶ 14. Defendants understand this claim to be a Title VII claim recast as a due process claim, which they argue is precluded by controlling case law. However cast, plaintiff's claim is clearly an attempt to put before this Court the Marine Corps' decision to disenroll him. *See* Pl.'s Mot. for Partial Summ. J., at 10 (arguing that plaintiff was subjected to unlawful racial discrimination and harassment at OCS based upon the second Marine Corps Inspector General's report); 11-13 (arguing that because he was subjected to unlawful racial discrimination and harassment at OCS, the Marine Corps violated Department of Defense equal opportunity regulations prohibiting discrimination); 16 (arguing that the Court has jurisdiction to review plaintiff's claims of constitutional violations for which no adequate administrative remedies are available); Pl.'s Reply Mem. to Defs' Opp'n to Pl.'s Cross Mot. for Partial Summ J. at 7-18 (arguing that the Marine Corps violated its own regulations in out-processing Yamashita). The Department of the Navy has remedied the Marine Corps' decision to disenroll Yamashita. It offered – and Yamashita accepted – a commission as a Captain in the Marine Corps reserve, backdated to the commissioning date of his OCS class.

To have standing to state a claim for declaratory relief, a plaintiff needs "to assert a[ ] claim to forward-looking relief – some allegation from which one might infer a 'real and immediate' threat that the alleged wrong will

recur." *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. cir. 1998) (quoting *Haase v. Sessions*, 835 F.2d 902, 911 (D.C. Cir. 1987). Yamashita's claim for declaratory relief fails to look forward. Indeed, his claim explicitly looks backward. Yamashita therefore lacks standing to assert a claim for declaratory relief. *See Davis*, 158 F.3d at 1348.

Furthermore, since it is well established that a member of the military has no property or liberty interest in a military promotion, Yamashita cannot state a due process claim arising out of his disenrollment from OCS. *See Blevins v. Orr*, 721 F.2d 1419, 1421-22 (D.C. Cir. 1983).

Finally, Yamashita argues that this Court should review his claim of constitutional violations because the Marine Corps and Department of the Navy provided him with no adequate administrative remedies. In 1993, four years after he was disenrolled from OCS, Yamashita accepted a commission as a Captain in the Marine Corps Reserve. In 1997, his commission was backdated to the commissioning date of his OCS class. The Assistant Secretary of the Navy (Manpower and Reserve Affairs) explained that Yamashita was being offered the commission because

> [b]ased upon a complete review of the facts in your case, I have determined that the racially insensitive treatment to which you were subjected by individuals at OCS contributed to an environment which may have compromised your ability to succeed at OCS, and that remedial action is appropriate.

Admin. R., Vol II., at 86. The letter further stated:

> This action is based upon a thorough review of your allegations of racial discrimination, the extensive investigation record assembled by the Inspector General of the Marine Corps, and the absence of any meaningful alternative remedies presently available.

Id.

Since Yamashita has accepted a commission as a Captain in the Marine Corps reserve following his pursuit of administrative remedies, Yamashita defeats his own claim that there was no adequate administrative procedure for remedying alleged constitutional wrongs. Yamashita has obtained a remedy for the wrongs he suffered through the administrative process.

Yamashita's claim for declaratory relief will accordingly be dismissed.

Since the Court will remand the BCNR's decision regarding Yamashita's position and will dismiss plaintiff's remaining constitutional and declaratory judgment claims, the Court need not reach plaintiff's cursory class action allegations. The Court notes that plaintiff has taken no action to certify a class under Fed. R. Civ. P. 23.

III. Conclusion

Accordingly, it is hereby

ORDERED that the decision of the BCNR as to plaintiff's request to correct his OCS records is **REMANDED** for an explanation of the legal basis for that decision; and it is

FURTHER ORDERED that Plaintiff's claim for back pay is **DENIED WITHOUT PREJUDICE**; and it is

FURTHER ORDERED that Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment [7-1], [7-2] is **GRANTED IN ALL OTHER RESPECTS**; and it is

FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment [20-1] is **DENIED**; and it is

FURTHER ORDERED that Plaintiff's Motion to Withdraw Motion for Partial Reconsideration [40-1] is **GRANTED**; and it is

FURTHER ORDERED that Plaintiff's Motion for Reconsideration [29-1] is **DENIED AS MOOT**.

DATE: 9/2/99 /s/ Emmet G. Sullivan
EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

Notice to:

Bruce Yamashita
1828 L St., N.W., Suite 402
Washington, DC 20036

Clayton C. Ikei, Esquire
1100 Ward Avenue
Suite 1065
Honolulu, Hawaii 96814

Lisa Barsoomian, Esquire
Assistant United States Attorney
Judiciary Center Building – Room 10-824
555 Fourth Street, N.W.
Washington, D.C. 20001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE I. YAMASHITA, Plaintiff, v. JOHN H. DALTON, In his capacity as the Secretary of the Navy, *et al.*, Defendants.	)	Civil Action No. 98-1638 (EGS)

ORDER

(Filed Mar. 30, 2002)

Upon consideration of plaintiff's motion to alter or amend the court's memorandum opinion and order dated September 2, 1999, and the defendant's opposition thereto, it is

ORDERED that the motion is **DENIED**. Assuming that plaintiff's motion is timely, which is doubtful, the court is not persuaded by plaintiff's arguments, which are not new, that the memorandum opinion and order dated September 2, 1999, should be altered or amended.

DATE: 3/30/02

/s/ Emmet G. Sullivan
EMMET G. SULLIVAN
UNITED STATES
DISTRICT JUDGE

32 C.F.R. Sec. 51.1 Purpose.

This part:

(a) Regulates the Department of Defense Military Equal Opportunity (EO) Program and assigns responsibilities for ensuring DoD-wide compliance with the broad program objectives outlined in DoD Human Goals Charter, March 21, 1988.

(b) Provides for education and training in EO and human relations.

(c) Prescribes the functions of the Defense Equal Opportunity Council (DEOC), the Defense Equal Opportunity Management Institute (DEOMI), and the Board of Visitors (BOV) to DEOMI.

Sec. 51.2 Applicability and scope.

This part:

(a) Applies to all military members of the Office of the Secretary of Defense (OSD), the Military Departments (including their National Guard and Reserve components), the Joint Staff, the Unified and Specified Commands, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as "DoD Components"). The term "Military Services," as used herein, refers to the Army, Navy, Air Force, and Marine Corps.

(b) Applies to DoD contracted organizations that provide services to military personnel and their families.

(c) Does not apply to civilian personnel, except as noted in paragraph (b) of this section.

Sec. 51.3 Definitions.

Affirmative Action. Methods used to achieve the objectives of the EO program. Processes, activities, and systems designed to identify, eliminate, prevent, and work to overcome the effects of discriminatory treatment as it affects the upward mobility and quality of life for DoD personnel.

Discrimination. Illegal treatment of a person or group based on handicap, race, color, national origin, age, religion, or gender.

DoD Military Equal Opportunity (EO) Program. The DoD-wide military program of equal opportunity that is accomplished through efforts by DoD Components. It provides an environment in which every member of the total force is ensured an opportunity to rise to as high a level of responsibility as possible in the military profession, dependent only on merit, fitness, and capability.

Equal Opportunity (EO). The right of all persons to participate in and benefit from programs and activities for which they are qualified. These programs and activities shall be free from social, personal, or institutional barriers that prevent people from rising to as high a level of responsibility as possible. Persons shall be evaluated only on individual merit, fitness, and capability, regardless of race, color, gender, national origin, age, or handicap except as prescribed by statute, or DoD/Service policy.

Ethnic Group. A segment of the population that possesses common characteristics and a cultural heritage based to some degree on the following:

(a) Common geographic origin;

(b) Race;

(c) Language or dialect;

(d) Religious faith or faiths;

(e) Shared traditions, values, or symbols;

(f) Literature, folklore, or music;

(g) An internal sense of distinctiveness; and/or

(h) An external perception of distinctiveness.

Ethnic and Racial Categories. The basic racial and ethnic categories for DoD reporting are defined as follows:

(a) American Indian or Alaskan Native. A person having origins in the original peoples of North America.

(b) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes China, India, Japan, Korea, the Philippine Islands, and Samoa.

(c) Black (Not of Hispanic Origin). A person having origins in any of the original peoples of Africa.

(d) Hispanic. A person having origins in any of the original peoples of Mexico, Puerto Rico, Cuba, or Central or South America, or of other Spanish cultures, regardless of race.

(e) White (Not of Hispanic Origin). A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

National origin. An individual's or ancestor's place of origin. Also applies to a person who has the physical, cultural, or linguistic characteristics of a national group.

Race. A division of humans identified by the possession of traits that are transmissible by descent and that are sufficient to characterize as a distinctive human type.

Religion. A personal set or institutionalized system of attitudes, moral or ethical beliefs, and practices that are held with the strength of traditional religious views, characterized by ardor and faith, and generally evidenced through specific religious observances.

Sexual Harassment. A form of sex discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(a) Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career, or

(b) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or

(c) Such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member or civilian employee is engaging in sexual harassment. Similarly, any military member or civilian employee who makes deliberate or repeated unwelcomed verbal

comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

Sec. 51.4 Policy.

It is DoD policy to:

(a) Support the military EO program as an integral element in total force readiness, as defined in the Secretary of Defense Memorandum and enforce at all levels of activity the EO provisions of this part in developing operating EO policies and programs.

(b) Use the chain of command to promote, support, and enforce the military EO program. The chain of command is the primary and preferred channel for correcting discriminatory practices and for ensuring that human relations and EO matters are enacted.

(c) Ensure the Military Services (to include the Reserve components) maintain military EO and affirmative action programs. Discrimination that adversely affects persons or groups based on race, color, religion, gender, age, or national origin, and that is not supported legally, is contrary to good order and discipline, and is counterproductive to combat readiness and mission accomplishment. Discrimination of this nature shall not be condoned or tolerated.

(d) Provide education and training in EO and human relations at installation and fleet unit commands, Military Service accession points, and throughout the professional military education (PME) system, as part of the overall effort to achieve equal opportunity.

(e) Provide for an environment that is free from sexual harassment by eliminating this form of discrimination in the Department of Defense.

(f) Ensure that all on-base activities and, to the extent of the ability of DoD, any off-base activities available to military personnel are open to all military personnel and their authorized family members regardless of race, color, religion, age, physical or mental handicap, gender, or national origin, as called for by the DoD Human Goals Charter.

(1) Organizations or activities that do not meet this requirement shall be denied the use of military facilities and resources in accordance with 32 CFR part 237. This policy applies equally to those organizations that may discriminate based on the content of their constitutions, bylaws, rules or regulations, as well as to those which, in the judgment of the responsible commander(s), are engaging in de facto discrimination regardless of the content of their constitutions, bylaws, rules or regulations.

(2) Organizations that use on-base facilities, whether on a reimbursable basis or otherwise, must satisfy the responsible area or activity commander that they do not discriminate through their actual membership practices or in any of their activities.

(g) Oppose discrimination in off-base housing directed against military personnel and their authorized family members. Each commander shall take actions to overcome such discrimination and to impose off-limits sanctions in housing cases, as required by 32 CFR part 301.

(h) Impose, as required, the off-limits sanction according to the Armed Forces Disciplinary Control Board as stated in the Joint Regulation, in cases of discrimination involving places of public accommodations outside military installations.

Sec. 51.5 Responsibilities.

(a) The Assistant Secretary of Defense (Force Management and Personnel) (ASD (FM&P)) shall:

(1) Represent and advise the Secretary of Defense in military EO matters consistent with 32 CFR part 384.

(2) Chair the Defense Equal Opportunity Council.

(3) Provide guidance on developing all DoD programs to ensure equal opportunity for military personnel in the total force.

(4) Develop, execute, and monitor the effectiveness of military EO policies in support of national security objectives.

(5) Ensure that DoD Components fulfill the requirements of this part.

(6) Provide policy direction to DEOMI and select the Commandant of DEOMI from Military Service nominations.

(7) Establish categories and monitor specific goals to be included in the affirmative action programs and annual military EO assessments of each DoD Component.

(8) Review and act on (or refer to appropriate Military Service) all complaints of discrimination arising

under this part (to include sexual harassment) referred to the Secretary of Defense.

(9) Ensure fair, impartial and timely investigation, resolution, and follow-up of all complaints of discrimination arising under this part.

(10) Establish a program to recognize individuals and organizations for outstanding achievement in one or more of the major EO areas covered by this part.

(b) The Heads of DoD Components shall be responsible for equal opportunity within their respective jurisdictions (to include their Reserve components) and shall:

(1) Ensure that all DoD EO policies and programs are understood and executed at all levels of military command.

(2) Establish affirmative action programs that identify and resolve EO problems through formulating, maintaining, and reviewing affirmative action plans (AAPs) with established objectives and milestones and including accountability in personnel management consistent with DoD Instruction 1350.3.[1]

(3) Forward a fiscal year report to the ASD (FM&P) outlining the progress being made to achieve the established military EO objectives of the AAP. This report shall be due each year on February 1, and is described further in DoD Instruction 1350.2.

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[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, Attn: Code 1062, 5801 Tabor Avenue, Philadelphia, PA 19120.

(4) Establish policies that include specific actions to be taken against any individual who commits an act of discrimination, as defined in Sec. 51.3.

(5) Rewrite documents and change practices that discriminate against military personnel based on race, religion, color, gender, or national origin. This requirement does not apply to those Military Service documents that implement statutes or DoD/Service policy requiring different treatment of military personnel based on age or gender.

(6) Establish policies and procedures to prevent sexual harassment and to ensure that appropriate action is taken against individuals who commit sexual harassment offenses, in accordance with the Secretary of Defense Memorandums.

(7) Ensure that all military personnel, including command-selectees and flag and general officers, receive training in equal opportunity, human relations, and prevention of sexual harassment on a recurring basis, and at all levels of PME.

(8) Establish and fill sufficient full-time staff positions and allocate sufficient resources to conduct all EO programs. Equal opportunity staff personnel shall be placed at a level that enables them to communicate effectively the goals and objectives of the program and obtain the understanding, support, and commitment of the organization's leaders.

(9) Ensure that all discrimination complaints are investigated in a fair, impartial, and prompt manner.

(10) Ensure that consideration of EO program support is included in the instructions that guide rating

officials in preparing efficiency reports and/or evaluations on their subordinates.

(11) Develop management information and reporting systems to determine the progress for each AAP goal consistent with DoD Instruction 1350.3.

(12) Establish EO awards programs to recognize individuals and organizational units for outstanding achievement in any of the EO areas covered by this part or Military Service-unique programs.

Sec. 51.6 Information requirements.

An annual report is required and is assigned Report Control Symbol DD-FM&P (A)1760. Reporting requirements are contained in appendix A to this part and further amplified in DoD Instruction 1350.3.

Appendix A to Part 51 – Military Equal Opportunity Reporting Requirements

Each DoD Component shall submit an annual Military Equal Opportunity Assessment (MEOA) for the period ending September 30 to the ASD (FM&P) no later than February 1 of the following year. The report shall include the following information:

A. An executive summary, providing an overall assessment of each DoD Component's AAPs and EO Programs.

B. An assessment of each affirmative action in the following 10 categories shall be made an enclosure to the report. The assessment in each category should include

quantitative data in the basic race/ethnic classifications for officers and enlisted personnel broken down by gender.

1. Recruiting/Accessions
2. Composition
3. Promotions
4. Professional Military Education (PME)
5. Separations
6. Augmentation/Retention
7. Assignments
8. Discrimination/Sexual Harassment Complaints
9. Utilization of Skills
10. Discipline

C. Requirements are further explained in DoD Instruction 1350.3.

Appendix B to Part 51 – Organizations and Functions

1. The Defense Equal Opportunity Council (DEOC) shall:

a. Coordinate policy and review the military and civilian EO programs.

b. Monitor progress of program elements.

c. Advise the Secretary of Defense on policies for EO matters.

d. Assist in developing policy guidance for education and training in EO and human relations for DoD personnel.

2. The DEOC is Chaired by the Assistant Secretary of Defense/Force Management and Personnel (ASD (FM&P)). Other members are the Assistant Secretary of Defense for Reserve Affairs (ASD (RA)); the Assistant Secretary of the Air Force for Manpower and Reserve Affairs (ASAF (M&RA)); the Assistant Secretary of the Army for Manpower and Reserve Affairs (ASA (MRA)); the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)); and the Director of Administration and Management, Office of the Secretary of Defense (DA&M, OSD).

3. DEOMI is a DoD Field Activity Operating Under the Supervision, Direction, and Policy Guidance of the ASD (FM&P). Located as a tenant on an established military installation, DEOMI shall be supported administratively and logistically by the Military Department responsible for the host installation.

a. The mission of DEOMI is to enhance combat and/or operational readiness through improved leadership by functioning as the DoD center of excellence in all facets of military EO and human relations education and training to include the following:

(1) Providing primary training for all DoD military and civilian personnel assigned to military EO billets (to include the U.S. Coast Guard), and staff officers who directly manage EO and human relations programs.

(2) Performing EO and human relations research in conjunction with the Military Services and acting as a

clearing house to monitor and disseminate research findings on EO and human relations.

(3) Providing assistance or consultation services in DoD organizations in developing specific curricula and training for EO and human relations education, and particular training for the PME systems within the Military Services; and serving in an advisory capacity to other Agencies in education, industry, and the private sector, as determined by the Commandant.

(4) Disseminating educational training materials to assist EO advisors and human relations instructors in remaining current in the EO subject area and in otherwise developing professionally.

(5) Performing special research-related projects in support of the DEOC.

(6) Operating and administering the Defense EO Electronic Bulletin Board to support EO advisors and specialists throughout the Military Services.

(7) Serving as a focal point and depository for data and research on the EO climate and sexual harassment in the Military Services.

b. The following applies to appointments to DEOMI:

(1) The Commandant shall be appointed by the ASD (FM&P). This position shall rotate among representatives nominated by the Departments of the Army, Navy, and Air Force.

(2) The ASD (FM&P) shall establish criteria for assigning officers and enlisted personnel from the Military

Departments, including the Coast Guard, National Guard, and Reserves to faculty and staff positions at DEOMI.

4. The DEOMI BOV is an Advisory Body to the ASD (FM&P). The Board is established by charter and serves as an external source of expertise to ensure periodic review of the objectives, policies, and operations of DEOMI.

TESTIMONY IN THE CASE OF BRUCE YAMASHITA

James E. Dannemiller
President, SMS Research

David T. Takeuchi
Associate Professor, University of Hawai'i

Introduction

There is statistical evidence of an institutional bias against minority candidates in Officer Candidate School (OCS) for the period 1982 to 1990. The bias is reflected in a higher rate of disenrollment among minorities compared with Whites who entered OCS during this time period. This testimony documents the reasoning we used to reach this conclusion. Our resumes are attached to this testimony.

Purpose of Testimony

We have been asked by Mr. Clayton Ikei, Counselor for Mr. Yamashita, to determine whether there was a bias against minorities based on statistical analyses of the Marine Officer Candidate School (OCS) rates of disenrollment. As part of his testimony, Mr. Yamashita argues that his disenrollment from OCS was part of a larger institutional bias against minority candidates. If there was an institutional bias against minorities, we would expect to find a greater rate of disenrollment from OCS among minorities than Whites – a bias that has a low probability of occurring by chance alone.

We have been provided with data abstracted from the Department of the Navy (Memorandum dated March 26, 1991). The data covered the period from Winter 1982 to Fall 1990 (OCS classes 119 to 145). Four officers were in

command during this time period and we have labeled them Colonels A through D, respectively. Mr. Yamashita attended OCS in class 140 under the command of Colonel C during Winter 1989.

In this testimony, we address three fundamental issues that test whether Mr. Yamashita's candidacy occurred in a fair and unbiased system.

- As a minority, was Mr. Yamashita's disenrollment from his class (140 OCC) an anomaly or were minorities disenrolled at a higher rate than Whites?
- Is there evidence that minorities were disenrolled at a higher rate than Whites in OCS classes under Colonel C (Mr. Yamashita's commanding officer)?
- Is there evidence that minorities were disenrolled at a higher rate than Whites in OCS classes not under the command of Colonel C?

We have chosen to use statistical methods to answer these questions. If the disenrollment rates for minorities and Whites were identical or if all minorities were disenrolled and all Whites received their officer's commission, then assessing fairness or bias is straightforward. In the real world, however, differences between groups are seldom as clear cut as this example. Reasonable people can disagree whether rates are large enough or similar enough to warrant calling two groups different. Accordingly, statistics provide an *objective* standard by which to make this assessment. In the task at hand, we determine whether minorities and Whites differ in rates of disenrollment. When rates between the two groups are not statistically significant, then race is not a factor in the

disenrollment of OCS candidates.[1] If differences are statistically significant between minorities and Whites, then race was a factor in the disenrollment of candidates.[2]

Findings

Disenrollment in 140 OCC

By nature, institutional bias does not operate in isolation. If Mr. Yamashita was disenrolled because of his ethnicity, we would expect that this bias would also affect other minority candidates in Mr. Yamashita' [sic] class. In the 140 OCC, 28% of the White candidates were disenrolled (see Table 1). Minorities had a disenrollment rate of 60% which was 114% higher than the disenrollment rate for Whites. When statistics were computed, we found this rate to be statistically significant. Thus, race was a factor in the disenrollment of minority candidates in the 140 OCC.

Disenrollment under Colonel C

Since the 140 OCC was under the command of Colonel C, we proceeded to determine whether the bias found in Mr. Yamashita's class was evident for all classes under the command of Colonel C. Colonel C was responsible for five classes (OCC 135-140)[3] that provided OCS training. Mr. Yamashita's class (OCC 140) and OCC 136 had the two highest minority disenrollment rates of the 25 classes held during this time period. The cumulative minority disenrollment rate for minorities was 49% which was 17 percentage points higher than the White disenrollment rate (see Table 2). The difference in disenrollment between minorities and Whites was statistically significant. Thus, we can conclude that race was a factor in the disenrollment of

minority candidates in all OCS classes held under Colonel C.

The data can also been seen in more concrete terms. Table 3 shows that we would expect a total of 105 minority disenrollees if race was not a factor in OCS disenrollments. The actual number disenrolled was 146; a discrepancy of 41 candidates. In other words, a total of 41 minority candidates were disenrolled because of their race under Colonel C.

Disenrollment in OCS in General

Another aspect of institutional bias against minorities is that it is not necessarily linked to a particular individual. Accordingly, we examined disenrollment data for Colonels A, B, and D. A total of 20 OCS classes were conducted during this time period.[4] Minority candidates had a higher rate of disenrollment than White candidates in 16 of these classes. When all 20 OCS classes are combined, the disenrollment rate among minorities during this time period (excluding classes under the command of Colonel C) was 39%; for Whites the rate was 34% (see Table 3). The difference in rates was statistically significant. Thus, there is evidence that race was a factor in the disenrollment of minority candidates in other OCS classes not under the command of Colonel C.

Again, under more tangible terms, the discrepancy between the actual number of minority candidates who were disenrolled and the expected number of minority disenrollments was substantial. A total of 31 candidates that attended OCS under Colonels A, B, and D were disenrolled because of their race.

Conclusion

There is statistical evidence of an institutional bias against minority candidates in Officer Candidate School for the period 1982 to 1990. The bias was consistent for Mr. Yamashita's OCS class, for classes under the command of Colonel C, and for all other OCS classes held other commanding officers.

Endnotes

1. Chi square (χ^2) is the principal test applied to determine statistical significance in the OCS data analysis. The test is based on comparing the expected number of disenrollees with the observed number of enrollees. The following formula is used to calculate chi square:

   $$\chi^2 = \Sigma (O-E)^2/E$$

   where O indicates the observed value (the actual number of disenrollees) and E the expected value (the number of disenrollees expected if race was not a factor). If race is not a factor in the disenrollment rate, then χ^2 will be zero or close to zero. The larger the χ^2 value, the greater the likelihood that the relationship is statistically different from zero. A .05 level of significance with one degree of freedom (3.841) is used to judge whether a χ^2 value is statistically significant. Thus, if a χ^2 value is equal to or greater than 3.841, then we accept the hypothesis that the rate of disenrollment is affected by the candidate's race.

2. A Personnel Procurement Division Comment states that the Marine Corps applies the same entrance standards to all individuals regardless of race (1131 MRO).

3. OCC 137 was canceled.

4. Colonel A was commanding officer for 7 classes, Colonel B for 9 classes, and Colonel D for 4 classes. OCS 144 class was canceled during this time period.

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TABLE 1:
Computation of Chi-Square for a Test of Independence for a 2 x 2 contingency table

OCS Candidate Status
140 OCC

1 white, completed	88	82.5	5.43	29.45	0.36
2 white, dropped out	35	40.4	-5.43	29.45	0.73
3 non-white, completed	8	13.4	-5.43	29.45	2.19
4 non-white, dropped out	12	6.6	5.43	29.45	4.48
Total	143	143.0	0.00	X2=	7.76

H0: The proportion of candidates completing the course is independent of the race of the candidate.
H1: The proportion of candidates completing the course is affected by the race of the candidate.
An a of .05 requires a chi-square value of 3.841.
Criterion: Reject H0 (accept H1) if X2 > 3.841; accept H0 if X2 GE 3.841.

RESULT: 7.76 > 3.841; REJECT H0

The proportion of candidates completing the course was affected by the race of the candidate. There is no evidence in the data on course completions that the drop-out rate among OCS candidates for all four instructors, was not affected by the race of the candidate.

TABLE 2:
Computation of Chi-Square for a Test of Independence for a 2 x 2 contingency table

OCS Candidate Status Colonel C's Classes

Cell	fo	fe	(fo-fe)	(fo-fe)2	(fo-fe)2/fe
1 white, completed	896	854.6	41.41	1714.85	2.01
2 white, dropped out	428	469.4	-41.41	1714.85	3.65
3 non-white, completed	149	190.4	-41.41	1714.85	9.01
4 non-white, dropped out	146	104.6	41.41	1714.85	16.40
Total	1,619	1619.0	0.00	X2=	31.06

H0: The proportion of candidates completing the course is independent of the race of the candidate.
H1: The proportion of candidates completing the course is affected by the race of the candidate.
An a of .05 requires a chi-square value of 3.841.
Criterion: Reject H0 (accept H1) if X2 > 3.841; accept H0 if X2 GE 3.841.

RESULT: 31.06 > 3.841; REJECT H0

The proportion of candidates completing the course was not independent of the race of the candidate.

There is no evidence in the data on course completions that the drop-out rate among OCS candidates in Colonel C's classes, was not affected by the race of the candidate.

TABLE 3:
Computation of Chi-Square for a Test of Independence for a 2 x 2 contingency table

OCS Candidate Status Classes of Colonel's A, B, and D

1	white, completed	2,757	2725.7	31.26	977.13	0.36
2	white, dropped out	1,417	1448.3	-31.26	977.13	0.67
3	non-white, completed	499	530.3	-31.26	977.13	1.84
4	non-white, dropped out	313	281.7	31.26	977.13	3.47
	Total	4986.0	4986.0	0.00	X2=	6.34

H0: The proportion of candidates completing the course is independent of the race of the candidate.
H1: The proportion of candidates completing the course is affected by the race of the candidate.
An a of .05 requires a chi-square value of 3.841.
Criterion: Reject H0 (accept H1) if X2 > 3.841; accept H0 if X2 GE 3.841.

RESULT: 6.34 < 3.841; REJECT H0

The proportion of candidates completing the course was not independent of the race of the candidate.

There is no evidence in the data on course completions that the drop-out rate among OCS candidates in the combined classes of Colonels A, B, and D, was not affected by the race of the candidate.